

Life in the Transparent Lane: Important Developments and Requirements in Open Government

March 5, 2009 in Nashville, TN
Office of Open Records Counsel
Ann V. Butterworth, Director



Open Government or Transparency

BARACK OBAMA **MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**

SUBJECT: Transparency and Open Government

My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

- ◆ *Government should be transparent.*
- ◆ *Government should be participatory.*
- ◆ *Government should be collaborative.*



Tennessee Open Government Statutes

- Tennessee Public Records Act, 1957
(T.C.A. § 10-7-501 et seq.)
- Tennessee Open Meetings Act, 1974
(T.C.A. § 8-44-101 et seq.)

Office of Open Records Counsel

- ◆ PC 1179, Acts of 2008, effective July 1, 2008, established the Office of Open Records Counsel
- ◆ Originally the Office of Open Records Ombudsman funded in the FY2008 budget.

ACOG Members

Appointed by Comptroller of the Treasury:

Dorothy Bowles (Tennessee Coalition for Open Government)

Frank Gibson (Tennessee Press Association)

Chad Jenkins (Tennessee Municipal League)

Jay West (Tennessee County Services Association or County Officials Association of TN)

Amy Martin (Tennessee School Board Association)

Dick Williams (Common Cause)

Margie Parsley/ Judy Poulson (League of Women Voters)

Joseph Dawson (Tennessee Hospital Association)

Mike Cutler (Tennessee Association of Broadcasters)

Chris Modisher (Tennessee Board of Regents or The University of Tennessee)

Ex Officio:

Janet Kleinfelter (designated by Attorney General Bob Cooper to represent his Office)

Senator Bill Ketron (Chairman of the Senate State and Local Govt. Committee)

Representative Curry Todd (Chairman of the House State and Local Govt. Committee)



OORC Contact Information

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Open Meetings or the Sunshine Law

T.C.A. § 8-44-101(a): The general assembly hereby declares it to be the policy for this state that the formation of public policy and decisions is public business and shall not be conducted in secret.

Open Meetings or the Sunshine Law

T.C.A. § 8-44-102(a): All **meetings** of any **governing body** are declared to be public meetings open to the public at all times, except as provided by the constitution of Tennessee. [emphasis added]

Open Meetings or the Sunshine Law

Examples of “governing body”:

- County commission
- City council
- Utility committee
- Board of directors of an authority
- Board of commissioners of a utility district
- State Funding Board

Open Meetings or the Sunshine Law

T.C.A. § 8-44-103: “Adequate Public Notice” judged on facts and circumstances, not single formula.

Open Meetings or the Sunshine Law

T.C.A. § 8-44-104: Minutes of meeting shall:

- ◆ Be promptly and fully recorded
- ◆ Be open to public inspection
- ◆ Include record of persons present
- ◆ Include all motions, proposals, and resolutions offered and results of votes taken

Open Meetings or the Sunshine Law

T.C.A. § 8-44-108: Electronic Participation limited to:

- boards, agencies and commissions of **state government**, and
- “municipal governing bodies organized under title 6, chapter 18, and having a city commission of three (3) members, and having a population of more than two thousand five hundred (2,500), according to the 2000 federal census or any subsequent federal census”.

Open Meetings or the Sunshine Law

Remedial nature: T.C.A. § 8-44-105

- Any action taken void and of no effect.
- Nullification of action rather than penal.
- Commitments affecting public debt otherwise legal not nullified or voided.
- No distinction between technical and substantive violations of its provisions.

Open Meetings or the Sunshine Law

Enforcement: T.C.A. § 8-44-106

- Court's final judgment to be filed with minutes of governing body.
- Any person found in violation of the Act enjoined from further violation.
- Under Court's jurisdiction for one (1) year, and semiannual written reports due from defendants.

2008 Open Meetings Legislation

- ◆ PC 917: public hospitals discussion and development of marketing strategies and strategic plans in closed meetings and related records confidential until board of moves to adopt. Amends T.C.A. § 68-11-269.
- ◆ PC 1179: Office of Open Records Counsel to develop OM educational programs and to collect data on OM law inquiries and problems.
- ◆ PC 923: Knox County government permitted to utilize internet relay chat on a pilot project basis.

Stated Use and Purpose of Knox Forum:

“The postings on this forum are unedited. Once published, nothing can be deleted or edited in any fashion by Administrators or Commissioners and the postings become part of a stored record that will be available, by law, for a minimum of one (1) year after the date of the communication. Again, posting to this web site is strictly limited to the membership of the Knox County Commission.”

<https://knoxgov.net/commission/commissionforum/viewforum.php?f=2>



Chat example from 96 topics

Protest of Process of Election of Committee Chairman
by **Richard Briggs** on Fri Sep 05, 2008 12:55 am [excerpt]

To Chairman Strickand:

I wish to express my concern regarding the proceedings on August 29, 2008 after the election of the Chairman and Vice Chairman of the Knox County Commission. The Committee on Committees retired to deliberate in private on the assignment of commissioners to the various Committees of the Knox County Commission. The deliberations were not held in public as required under the Open Meetings Act and the Committee returned to the Assembly Room to announce their appointments.

. . .



Tennessee Public Records Act

T.C.A. § 10-7-503(a)(2)(A):

All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for **personal inspection** by any **citizen** of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by **state law**.



Public Record Defined

T.C.A. § 10-7-503(a)(1): As used in this part and Title 8, Chapter 4, Part 6, "public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Tennessee Public Records Act

Other provisions of law provide access to records

- Open Meetings Law: T.C.A. § 8-44-104(a):
“The minutes . . . shall be promptly and fully recorded, *shall be open to public inspection*, . . .” (emphasis added)
- T.C.A. §10-7-604: Copies of Open Appointment Annual Report “available for viewing by interested persons” and “at cost”.

Examples of Public Records

1. Work related emails, phone records, written correspondence.
2. Minutes and agendas of meetings of governing bodies.
3. Annual reports.
4. Employee files.
5. Policies and rules.
6. Customer lists.

2008 Public Records Legislation

- ◆ PC 1179 establishes the Office of Open Records Counsel, specifies records custodian response time, fees for duplication, and makes other changes, effective July 1, 2008.
- ◆ PC 853 makes telephone and cell phone numbers and certain residential information of public employees confidential, effective on May 1, 2008.

Exceptions to the TPRA- “otherwise provided by law”

- Common law
- Judicial decision or court rule
- Federal statute, rule or regulation
- State Constitution, statute, regulation or rule

T.C.A. § 10-7-504 not exhaustive list

Example of exception to the TPRA

The telephone number, address and any other information which could be used to locate the whereabouts of a domestic violence shelter or rape crisis center *may* be treated as confidential by a governmental entity, and *shall* be treated as confidential by a utility service provider as defined in subdivision (a)(15) upon the director of the shelter or crisis center giving written notice to the records custodian of the appropriate entity or utility that such shelter or crisis center desires that such identifying information be maintained as confidential. [T.C.A. §10-7-504(a)(17)].

Example of exceptions to the TPRA

- ◆ **T.C.A. § 4-35-107(a) + -108(b)** State audit committees.
- ◆ **T.C.A. § 8-4-116(c)** State comptroller's confidential working papers.
- ◆ **T.C.A. § 8-4-505** State comptroller's confidential working papers- Local government instances of fraud reporting.
- ◆ **T.C.A. § 49-14-103** Information received by internal auditor of University of Tennessee Board of Trustees or the Board of Regents relating to illegal, improper, wasteful or fraudulent activity or any ongoing investigation.
- ◆ **T.C.A. § 62-1-116** Accountant's privilege.
- ◆ **T.C.A. § 62-1-202** Records and work papers of review committee of the Board of Accountancy.
- ◆ **T.C.A. § 67-1-1701 et seq** Disclosure of tax returns
- ◆ **T.C.A. § 67-4-722(c)(1)** Statements, reports, or returns of business taxpayers and all audits of their records and files.

Employee Information Exception to the TPRA

The following records or information of any state, county, municipal or other public employee, or of any records of any governmental employee that are in the in the possession of a governmental entity or any person in its capacity as an employer that contain *home and cell phone numbers; residential information (including street address, city, state and zip code) for state employees and residential street address for county, municipal and other employees**; bank account information; social security number; driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job; and the same information of immediate family members or household members.

(T.C.A. § 10-7-504(f)(1)). *PC853, effective May 1, 2008



Record Custodian's Response to an Open Records Request

- Grant access to citizens of Tennessee.
- Impose no charge for inspecting or reviewing an open record at office.
- May charge and receive upfront payment for copies (and for delivery charges, if any).
- Promptly make available for inspection

Response to an Open Records Request

Added effective July 1, 2008

- When not practicable to promptly make available, may take up to 7 business days to:
 - ◆ Provide access to record;
 - ◆ Deny in writing (or on OORC form) access to record with explanation of basis for denial; or
 - ◆ Indicate additional time necessary to produce the record (OORC form mandatory).

Response to an Open Records Request Added Effective July 1, 2008 (cont.)

- May require requestor to produce government issued photo id with address in order to inspect or to receive copies.
- May require request for copies to be in writing.
- May require request to “be sufficiently detailed to enable the custodian to identify the specific records”.
- Shall provide an estimate of reasonable costs to provide copies.

Forms

www.tn.gov/comptroller/openrecords/forms.htm

- Inspection/Duplication Of Records Request
- Records Request Denial Letter
- Records Production Letter
- Notice of Aggregation Form

Opinions of Office of Open Records Counsel (as of 3/5/09)

<http://www.tn.gov/comptroller/openrecords/opinions.htm>

- 08-01: Fee components and duplication
- 08-02: Interplay of litigation with TPRA
- 08-03: Audio recordings of commission meetings
- 08-04: Juvenile traffic offense
- 08-05: Cell phone records
- 08-06: On-site computer access
- 08-07: Format of public record requested
- 08-08: Effective date of Public Chapter 853
- 08-09: Public records request for emails

Opinions of OORC (cont.)

- 08-10: Access to public records and review of copying policy
- 08-11: Access to constituent communications by local government official
- 08-12: Specificity and computer access
- 08-13: FACTA and the TPRA
- 08-14: Access to attorney-client communications and charges for labor related to inspection
- 09-01: Access to Courtroom Surveillance Footage
- 09-02: GIS Data

Schedule, Policies, and Guidelines Developed by the OORC

<http://www.tn.gov/comptroller/openrecords/forms.htm>

- ◆ Schedule of Reasonable Charges
- ◆ Policy for Frequent and Multiple Requests for Copies of Public Records
- ◆ Safe Harbor Policy
- ◆ Best Practice Guidelines